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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~637~~ 16

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY, *Appellee.*

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

REPLY OF APPELLANTS TO MOTION TO AFFIRM

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REPLY OF APPELLANTS TO MOTION TO AFFIRM

Now come the appellants in the above-entitled cause, the Railway Labor Executives' Association, et al., pursuant to Rule 16, paragraph 3 of the Revised Rules of this Court to reply to the motion of the appellee Frisco Transportation Company to affirm the judgment of the District Court.[1]

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[1] The motion is also addressed to the appeal of American Trucking Associations, Inc., et al., in Case No. 636, and the Interstate Commerce Commission in Case No. 651.

I.

Authority of Commission to Condition Railroad Purchased Motor Carrier Certificate Where Reservation of Authority is Contained Only in Order Approving the Purchase.

In *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, the Court sustained the power of the Commission to reopen an acquisition proceeding and condition the purchased motor carrier certificates of a railroad subsidiary so as to make operations thereunder auxiliary to or supplemental of the railroad's train service where authority to do so was contained in the certificates or the certificates had not yet been issued. The Court left open for future determination upon "a fully developed statement and argument by the interests affected" the validity of such Commission action where the reservation is not contained in the order directing the issue of the certificate or the certificate itself.

The present case presents the issues of whether (a) the reservation is in the order directing the issue of the certificate when it appears in the order approving the purchase, and (b) whether, in any event, it is sufficient if the reservation appears only in the approval order. If either of these questions are answered in the affirmative, the judgment of the District Court is in error and the authority of the Interstate Commerce Commission has been erroneously impaired in important respects. Such issues are obviously substantial requiring this Court's full consideration. The *Rock Island* decision so recognizes.

Appellee argues that no substantial issue is involved because it says that the "compliance order" is the order directing the issue of the certificate and that the reservation of authority was not contained in said

order (Motion, 22-23). The so-called "compliance order", an example of which is attached to the motion as Appendix 1 (Motion, 31), is an instrument of a routine procedure for the issuance of certificates and is simply a kind of tentative certificate which is issued unless the licensee objects. As such, it clearly is not the basic source of the authority which the appellee received. That source is the orders approving the purchases in which the reservation appeared.

Moreover, as appears from Appendix 1 of the motion, the "compliance order" recites that there has been an approval of a purchase "as provided in Section 213 of the Motor Carrier Act, 1935" (Motion, 31) and that "applicant shall not engage in any motor carrier operations not described herein *or otherwise lawfully authorized*". (Motion, 32, emphasis supplied.) All that had been lawfully authorized by the orders approving the purchases was for appellee to take over the routes and operations of the vendors and provide a coordinated rail-truck service upon the basis of representations that this was appellee's purpose in making the purchases (Jur. Stat. 8-10). Under such circumstances, appellants submit that it is wholly unreasonable for appellee to contend as it does that the "compliance orders" were intended as Commission action reversing its Division 5 and granting appellee unrestricted operating rights. Appellee had not appealed the Division 5 orders in accordance with Interstate Commerce Commission rules, but rather by its own admission (Motion, 6) had accepted those orders, including the reservation of authority contained therein, and completed its purchases.

In addition, appellee's argument ascribes to the Commission the exercise of an authority beyond that

agency's power as limited by the proviso in former Section 213(a)(1) and present Section 5(2)(b) of the Interstate Commerce Act. Appellee says that "the Commission has never held that it did not have the power to issue unrestricted certificates to a rail-affiliated motor carrier." Indeed, the appellee goes much further and argues that in a Section 5(2) proceeding the Commission may authorize a completely independent railroad-controlled truck service without regard to the carrier's rail service (Motion, 24-26). To the contrary, the Commission has squarely held that it has no discretion to relax the requirements of Section 5(2)(b) in acquisition proceedings such as those in which appellee acquired its motor carrier certificates. In *Cincinnati, N. & C. Ry. Co.—Control—Lehigh Valley Transit*, 57 M.C.C. 41, the Commission stated (pages 49, 51, 52):

> "Applicants further contend that, assuming applicants are affiliated with the railway, it is not necessary that we find that the motor-vehicle service of the carriers of which control would be acquired would be used to public advantage by the railway in its operations, because the literal requirements of the proviso of section 5(2)(b) can be relaxed in order to carry out the declared national transportation policy. * * *
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> * * *
>
> "Apparently applicants concede that they are unable to submit evidence sufficient to meet the proof requirements of the proviso of section 5(2)(b), the application contains no such evidence, and it is not apparent to us how those requirements can be met in view of the location of the railway, the nature of the service which it renders, and the location of the motor bus carriers which the partnership would indirectly control. We do not agree with the position of applicants that we are empowered to relax the specific requirements

> of the statute and find that this transaction would be consistent with the public interest, without also finding that the railroad would be enabled to use service by motor vehicle to public advantage in its operations. As stated in *ET & WNC M. Transportation Co.—Lease—Imperial Transp. Co. Inc.*, 5 M.C.C. 196: 'Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation.' "

These requirements have been interpreted by the Commission to mean that the motor carrier service of a railroad or its subsidiary must be auxiliary to or supplemental of the train service of the railroad, in contrast to an unrestricted independent truck service, and such interpretation has been sustained by this Court. *American Trucking Associations, Inc., et al.* v. *United States*, 355 U.S. —, 2 L. Ed. 2d 158, 163 (decided December 9, 1957).[2] There is no contention in this case that the operations of appellee as authorized by the lower court judgment are auxiliary to or supplemental to the train service of the Frisco Railroad. In fact, the Commission imposed the restrictive conditions involved because the operations were not those of a coordinated rail-truck service and in order to make them so.

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[2] Also see Mr. Justice Frankfurter's separate opinion in *Schaffer Transportation Co.* v. *United States*, 355 U. S. —, 2 L. Ed. 2d 117, 124, decided December 9, 1957, in which there is compared the narrowly specific provisions of the Interstate Commerce Act, such as Section 5(2)(b), leaving practically no scope in their application, with broader provisions of that statute.

II.

Effect of Inadvertence Upon the Commission's Authority.

Assuming that it is insufficient for the Commission to reserve authority in its orders approving railroad purchases of motor carriers to impose future conditions to keep the operations auxiliary to or supplemental of the railroad's train service, the further issue is presented of what effect the inadvertent omission from the subsequent "compliance orders" and certificates has on the Commission's power. The District Court held that it made no difference since the Commission was prevented by the decision in *Watson Bros. Transportation Co.* v. *United States,* 132 F. Supp. 905, aff'd 350 U.S. 927, from imposing the conditions involved. The appellee attempts to avoid this issue by arguing that the court below did not hold that the Commission had no power to correct clerical error, but that the Commission's action amounted to more than such a correction, and that for such reason the court examined the evidence (Motion, 23). However, this is merely another way of disagreeing with the Commission's conclusion that the omission of the reservation from the certificate and compliance order was inadvertent. That ground of the District Court's decision is embodied in its finding that the Commission's conclusion of inadvertence is not supported by adequate evidence (Jur. Stat. Appendix B, 30a). The court below also held as an alternative ground for decision not dependent on its evaluation of the evidence that the agency's action constituted an invalid revocation of appellee's certificates (Jur. Stat., Appendix B, 30a). This holding could not have been made as an independent ground for reversing the Commission

unless the agency's action was invalid even if the omission was inadvertent.

Appellants submit that the holding of the District Court that the Commission had no power to impose the conditions raises a substantial issue with respect to the scope of the agency's power where the omission of the reservation from the certificate is the result of an inadvertence. Such holding also puts in question the agency's power generally to correct errors in certificates.

III

Adequacy of the Evidence Supporting Inadvertence.

The lower court's action in substituting its judgment for that of the Commission on the inadvertent nature of the omission of the reservation of authority from the compliance orders and certificates is contrary to all established principles for review of administrative orders and requires correction by this Court. Appellee tries to support the decision below on this point by arguing that no Commission employee testified as to the matter and that the agency simply inferred inadvertence (Motion, 20-21). However, there was clearly no necessity for such testimony. Appellee's argument before the Commission and in the courts is that the compliance orders and certificates represented deliberate agency action changing the limited nature of the approval given in the purchase proceedings. This is not a matter of testimony by a Commission employee or inference. It is a matter of what the agency did at the time it acted and the Commission's declaration thereon embodied in formal findings controls unless the appellee could point to evidence showing such declaration to be con-

trary to fact. A claim that the Commission's acquisition orders were deliberately revised by the certificates requires proof from the appellee and it has no proof beyond the documents themselves. This is clearly insufficient in the light of the agency's finding, particularly when the compliance orders recited the issuance of the purchase approval orders and told appellee that it could engage in only those operations listed and "otherwise lawfully authorized."

CONCLUSION

For the reasons set forth in the Jurisdictional Statement and this reply, the motion to affirm should be denied, jurisdiction noted, and the judgment below reversed.

Respectfully submitted,

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